

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARGARITA DELGADO, et al., :
:
Plaintiff, : 13-CV-4427 (NGG)
:
v. : February 6, 2015
:
OCWEN LOAN SERVICING, LLC., :
et al., :
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE CONFERENCE ON AN AGREEMENT
ON THE FOX LITIGATION AND ESI PROTOCOL
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Appearances continue on next page)

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1 (Proceedings began at 2:10 p.m.)

2 THE COURT: All right. We are on the record here.

3 This is Delgado v. Ocwen Loan Servicing LLC., 13-CV-4427.

4 Will counsel please state their appearances for the
5 record? Just counsel on the case at this time.

6 MR. WITTELS: Steven Wittels from Wittels Law for
7 the plaintiffs and their class.

8 MR. McINTURFF: Burkett McInturff from Wittels Law.

9 MR. JENSEN: Oh. J. Christopher Jensen, Cowan
10 Liebowitz & Latman, for the plaintiffs.

11 FEMALE VOICE: [Inaudible].

12 MR. McELROY: Jason McElroy from Weiner Brodsky
13 Kider for defendants Cross Country Home Services, Incorporated
14 and Sandra Finn.

15 MR. PREVIN: Matthew Previn of Buckley Sandler for
16 defendant Ocwen Loan Servicing.

17 THE COURT: And as an observer we have?

18 MR. JOHNS: Ben Johns, Chimicles & Tikellis, on
19 behalf of Meghan Fox, the plaintiff in New Jersey that was
20 recently transferred to this court.

21 THE COURT: Right. And one of the reasons you've
22 been invited is I -- just from reading the docket sheet --

23 MR. JOHNS: Right.

24 THE COURT: -- and the complaint, it appears that
25 either the plaintiff or all parties thought that there should

1 be a transfer here so that there could be a uniform decision
2 on the cases.

3 Are all parties in agreement on that?

4 MR. McELROY: All parties to the Fox matter are in
5 agreement on that. I can't speak for the Delgado.

6 THE COURT: Yeah, the Delgado people may not be.

7 MR. WITTELS: Right. We were actually not consulted
8 until we saw -- well, we weren't consulted at all on that
9 question. We saw Your Honor's order directing that the Fox
10 plaintiff show up. We've -- let me just preface this by
11 saying as I told Judge Garaufis this morning, we believe that
12 the case could and should be dismissed, and I'm referring to
13 the Fox case, under the first to file rule.

14 Because we've been litigating the case for a year
15 and a half. Our claims encompass the entire class. The
16 claims brought in the Fox case were substantially similar and
17 really just a mirror image of what we already have done, it's
18 a copycat complaint. So --

19 THE COURT: But aren't there state law claims?

20 MR. WITTELS: We have those.

21 THE COURT: For New Jersey too?

22 MR. WITTELS: We have all of those. They've --
23 there were all --

24 THE COURT: There's nothing that's different.

25 MR. WITTELS: They maybe a little point to one thing

1 but that doesn't help on the first to file rule. Because as
2 long as its terminology, as long as it's encompassed, you're
3 really bound to rule that the first filed case goes forward.
4 Even if you don't have identical claims, even if you don't
5 have every claim that they had, it's still barred under the
6 first to file rule. That's the what the case decisions are
7 that we believe.

8 But that said, it is our goal from the plaintiff's
9 perspective not to be fighting with the same -- other
10 plaintiffs. I mean it's not necessarily to the advantage of
11 any party. So what we propose today, and I believe Mr. Johns
12 is empowered to agree to it, is that we've made an application
13 for lead counsel in the case in terms of class counsel.

14 THE COURT: Right.

15 MR. WITTELS: I believe defendant's only opposition
16 at the time we made the motion was that it was premature.

17 THE COURT: And that was my concern too.

18 MR. WITTELS: Right. I think at this stage we need
19 one voice, so it's not premature. That's our plaintiff's
20 perspective. Mr. Johns would support us as -- with held law
21 as in terms of lead class counsel conditioned on our not
22 filing a first to file motion to dismiss their case. And in
23 return for that we would agree to allow, whether it's amended
24 and consolidated with us or -- we've got to talk about the
25 mechanics of it, but we would allow them as counsel to be

1 joined as counsel in our case subject to our being the lead
2 counsel with the discretion to sign and allocate work as lead
3 counsel deems fit. So long as we didn't have disputes down
4 the road where we're challenged as to what work was allocated.
5 I want to make sure we don't have that.

6 Would that be something you would agree to?

7 MR. JOHNS: Yes, that's accurate and that's -- I'm
8 sorry that we were late coming in here, Your Honor, but that
9 was what we were discussing in the hallway. Yes, I think
10 that's an accurate recitation of our understanding.

11 THE COURT: Okay. Does anybody else want to be
12 heard on that or?

13 MR. WITTELS: Well, just to follow up again, the --
14 well, I'm happy to hear them. But our agreement would be
15 obviously on the record today that Your Honor felt it
16 appropriate Wittels Law would be appointed lead interim class
17 counsel. Mr. Johns' firm will join as counsel subject to
18 their being delegated work at the discretion of lead counsel
19 and the stipulation that they would not contest the amount of
20 work or the allocation of work.

21 THE COURT: Will there be other cases filed too
22 nationwide, class action with the same allegations --

23 MR. WITTELS: No, our --

24 THE COURT: -- from other states?

25 MR. WITTELS: We can't stop other plaintiffs out

1 there. The defendants have not informed us of any such suit,
2 so at this point we don't anticipate it. No one's approached
3 us from any other lawsuit.

4 THE COURT: So this is -- you don't anticipate this
5 will end up being an MDL case, for example.

6 MR. WITTELS: No.

7 THE COURT: All right.

8 MR. PREVIN: We obviously have no insight. We're
9 not aware of any, but, you know, one could be filed tomorrow,
10 there's no way for us to know. This is the first we've heard
11 of it, so can you clarify would there be a single -- would you
12 be consolidating the two cases into one case with one
13 complaint or? I'm a little confused as to the proposal.

14 MR. WITTELS: Well, we wouldn't want to -- again it
15 was just an agreement discussed today for the first time in
16 light of Mr. Johns coming here. But we would not want to make
17 it any -- create duplicative work for the defendant. So --

18 THE COURT: Or even the Judge.

19 MR. WITTELS: Well, that was, yes, a primary
20 concern. Thank you, Your Honor.

21 THE COURT: I don't think it's primary.

22 MR. WITTELS: One thing -- in answer to that, just
23 to advise Judge Levy, we told Judge Garaufis this morning that
24 the defendants had made a pre-motion application to file
25 another motion to dismiss --

1 THE COURT: Right.

2 MR. WITTELS: -- the additional counts brought for
3 18 additional plaintiffs. And what we worked out was that we
4 as the plaintiffs would respond to the defendants by March 6th
5 -- is that right?

6 MR. McINTURFF: March 6th.

7 MR. WITTELS: March 6th, with our comments and
8 hopefully an agreement that we'll be talking before that time
9 about what claims we would withdraw, if any. We might
10 withdraw claims they brought. They've given us many reasons
11 why they think certain counts are inappropriate. And --

12 THE COURT: And subject for saving. So responding
13 just to you, that's not in an opposition position.

14 MR. WITTELS: Right.

15 THE COURT: Okay.

16 MR. WITTELS: We would --

17 THE COURT: Your response to them.

18 MR. WITTELS: -- respond to them by March 6th, so
19 they would know what they had to move on, if anything, in
20 terms of which counts. Because they are challenging different
21 plaintiffs and different state's laws for various reasons. So
22 we need time to look at the laws because they just gave us
23 their position on that last week. So Judge Garaufis thought
24 it was a good idea that we try to work that out. And then we
25 would streamline perhaps their motion to dismiss and that was

1 -- a briefing schedule that was set by the Judge for that for
2 a few weeks after for them to move.

3 And the reason I bring that up is because as part of
4 that process I think we would want to work out sooner rather
5 than later what to do with the New Jersey plaintiff, whether
6 they would be added as an additional plaintiff. Probably
7 that's so but I need to look more at their plaintiff.

8 Because we already have a New Jersey plaintiff so --
9 we have another New Jersey plaintiff. Or whether they would
10 just come on as counsel. But it wouldn't materially affect I
11 think the case. There is -- they might have one count, I
12 think they have a New Jersey RICO count that was not in our
13 complaint, and we might add it.

14 MR. PREVIN: But it would materially impact from our
15 perspective whether we are filing two separate motions to
16 dismiss in each case. Or if you're going to consolidate them,
17 then obviously we can put that other recently transferred case
18 aside and act as if there's just a single pleading.

19 MR. WITTELS: It's -- that's how we envision it, it
20 would be one pleading.

21 THE COURT: Uh-huh. Well, the Court might actually
22 decide if that's the right thing to do too, so.

23 MR. WITTELS: I mean it's been -- and Mr. Johns, you
24 would agree, I mean you would probably want one complaint.

25 MR. JOHNS: I think that makes a lot of sense.

1 Yeah.

2 THE COURT: Yeah, I think the Court would want that
3 too. I can't see a reason to have two separate cases unless
4 there are separate causes of action. If there's separate
5 causes of action --

6 MR. WITTELS: No.

7 THE COURT: -- then it doesn't make sense, but I
8 guess it doesn't.

9 MR. WITTELS: No. So we would -- we were
10 envisioning, that's how we talked about it as having one
11 complaint, just really adding, whether it's the initial named
12 plaintiff, but -- and having the Chimicles firm on as counsel.

13 MR. JENSEN: Your Honor, I just saw -- I'm on the
14 record. Mr. Wittels had asked our firm to join in this action
15 to assist him now that we're on the -- you know, just at the
16 beginning of what could be a lot of discovery and a lot of
17 work. I just want to indicate for the record that, you know,
18 we're in agreement with Mr. Wittels. To the extent that it
19 matters, we supported his application to be appointed lead
20 counsel, and we will work with him on the same basis as other
21 counsel.

22 THE COURT: All right. So at this point then if the
23 cases are consolidated, there's no opposition to the
24 appointment of Mr. Wittels' firm as lead counsel? Or you'd
25 like to think about it?

1 MR. PREVIN: I think I'd like to think about it. I
2 mean my -- I'm not sure that the -- whatever efficiencies we
3 can create in this process would be desirable, obviously. I'm
4 not -- I don't think anything has been said mooted my concern
5 that this was premature I think as we're not in the class
6 certification stage. So I think it's constructive for all
7 parties if there's a common understanding of who is the lead
8 on their side, who we interact with during the litigation
9 process. But that's a separate issue from whether they are
10 actually appointed as interim class counsel because we're not
11 at the class stage. So I think everything we said in our
12 prior papers still stand.

13 THE COURT: Right. Well, wait, let me give you my
14 perspective. I thought it was premature before because I was
15 worried that there would be other lawsuits that could be
16 filed, and I wanted to hear from essentially other counsel as
17 to what their theory is of the case and how they would like to
18 lead it.

19 The fact that some time has passed, two lawsuits
20 have been filed but no others that have come to this court
21 suggests to me that it wouldn't cause any procedural
22 complications to have an interim class counsel appointed with
23 the understanding that the words interim -- the word interim
24 means interim, and it doesn't give you any more tenure than
25 anyone else but it might give you -- you know, if your track

1 record is good maybe the defendants won't oppose it. And
2 class doesn't necessarily mean the class has been or will be
3 certified. So given that that's what's done, I think it would
4 just be an efficiency.

5 MR. PREVIN: With that understanding, that it's sort
6 of for optics and efficiency and not sort of a prejudgment of
7 --

8 THE COURT: Right.

9 MR. PREVIN: -- of the underlying Rule 23
10 requirements, then I expect we can live with that.

11 THE COURT: Because -- go ahead.

12 MR. McELROY: I just said for the record, Cross
13 Country defendants agree --

14 THE COURT: Okay.

15 MR. McELROY: -- with Ocwen's position.

16 THE COURT: In my experience, especially in MDL
17 cases, it really helps to know who's the lead counsel. And if
18 you have a period of time where there are several attorneys in
19 the case and you don't know who the lead counsel is, it causes
20 problems, especially for the defendants, I think. I don't
21 know if your experience has been the same, but that's -- I
22 think that makes sense at this point. Okay.

23 MR. WITTELS: So --

24 THE COURT: What else?

25 MR. WITTELS: All right. Well, we're here -- just

1 so the record is clear, Ben Johns, you're in agreement then
2 with how I phrased it on the record here today? Because there
3 is a record being made --

4 MR. JOHNS: Yes.

5 MR. WITTELS: -- of our position as interim lead
6 class counsel.

7 MR. JOHNS: Correct.

8 MR. PREVIN: Okay. Can I -- and this is maybe a
9 little bit beyond the -- maybe I need to address this with
10 Judge Go, but we would obviously like then for that case to be
11 set aside until you've made a decision as to whether that case
12 is going to proceed or if it's going to be rolled into this
13 case. We don't want to, obviously, have to move to dismiss
14 that case while you're making this decision.

15 THE COURT: Right. Judge Go and I have spoken
16 already about this, and that's why everything is happening
17 today. That's why Fox counsel is here today. Because we
18 wanted to make a decision as to how to proceed. So I don't
19 think there will be any problem with that.

20 MR. PREVIN: Okay.

21 MR. WITTELS: I want to -- at the risk of not
22 arguing but just making a point. We disagree with Mr. Previn
23 just on when he says optics. Because interim class counsel is
24 what it is under Rule 23(g). It's not -- it doesn't say
25 optics. It certainly is not -- it doesn't mean that a class

1 has been certified --

2 THE COURT: Right.

3 MR. WITTELS: -- or we've met the elements.

4 THE COURT: Or will be.

5 MR. WITTELS: Right. But it does mean what Rule
6 23(g) says in that you are the lead counsel to whom the
7 defendants and other counsel look to to lead the case, protect
8 the interests of the class, lead the discovery issues, and
9 make the decisions on the case. That's the purpose of it, so
10 I just wanted to --

11 THE COURT: Right. And if there's discovery you'll
12 have a document bank, for example. You'll be in charge of all
13 the efficiencies as well as the decisions. Yeah, okay.

14 MR. WITTELS: Judge, the other issue we're here on
15 today other than -- I think this was originally a status
16 conference that sort of morphed into these other issues of, A,
17 the class counsel issue and, B, we have before you a discovery
18 dispute on the ESI. Both sides have presented their position,
19 and we'll go first unless defendant's chomping at the bit.
20 But we, I just wanted to introduce who we have here today.

21 We have Chuck Kellner from D4 Discovery, who is our
22 E consultant, and he has come down today because we believe it
23 is a very important issue of -- that needs to be set forth
24 right here at the opening as to how the protocol is going to
25 go forward. And we've had a dispute with defendant that we've

1 not been able to resolve. That's why both sides presented
2 their position and why we brought Mr. Kellner to you today.
3 And so we'd like to present that in whichever order you think
4 is appropriate, and Mr. McInturff, my co-counsel, is going to
5 describe the dispute when you're ready.

6 THE COURT: I'm ready.

7 MR. McINTURFF: So the parties have been able to
8 reach agreement on many of the issues in the ESI protocol, but
9 we remain, there remains a dispute regarding defendant's
10 disclosure of the custodians who will be -- both individual
11 custodians and data that will be searched as part of the ESI
12 process. And then also the second issue is regarding
13 plaintiff's participation in the creation and application of a
14 search methodology, if a search methodology is used.

15 Essentially our position is is that it's consistent
16 with both best practices and Rule 26 as well as the model
17 protocol that we're using for this case, which is the Southern
18 District's ESI protocol, that the parties promptly exchange
19 names and locations of ESI custodians, and that also that
20 plaintiffs play a meaningful role in the search methodology.

21 We're concerned that if search terms are used
22 without plaintiff's -- and without the process being an
23 iterative process between the parties discussing what comes
24 back as a hit report. Whether certain terms are too broad or
25 certain terms are too narrow, we're concerned that we could

1 run into the circumstance of either having a data dump of
2 millions of documents that are overly inclusive or too few
3 documents because of a search methodology that is not
4 accurate.

5 So that's been our position, and that's what we've
6 submitted as a proposed order as Exhibit 1 to our letter. We
7 believe that our position is amply supported by both the case
8 law, Sedona principles, and, as I said before, the model
9 protocols in the Southern District of New York and the 7th
10 Circuit, which, with the aid of our discovery consultant,
11 we've been utilizing this process. So we'd ask that Your
12 Honor would grant our proposed order so that we can proceed
13 with ESI discovery.

14 MR. McELROY: Good afternoon, Your Honor. Thank you
15 for having us in today. I want to start off by saying that we
16 disagree with the idea that this is a discovery dispute. This
17 is a dispute over what we will agree on in a proposed ESI
18 protocol pursuant to the case management order that we agreed
19 to with Your Honor back in November.

20 So pursuant to that case management order, we agreed
21 to produce initial disclosures by a certain date, which we
22 met. We agreed to respond to the plaintiff's discovery, which
23 at the time we thought was premature for certain issues but we
24 agreed to respond to the discovery that they had served by a
25 date certain, and agreed to discuss and come to an agreement

1 on what was simply called an ESI protocol in that case
2 management order.

3 When we started speaking about the ESI protocol
4 plaintiffs made the first proposal, they sent it to us. And
5 part of that proposal included the language that's in dispute
6 right now, which is, first of all, provisions where we provide
7 ahead of time any potential custodians that may have relative
8 information and some other ESI information.

9 Despite the fact that as part of the case management
10 order we specifically agreed to 15 interrogatories for the
11 plaintiff only to ask about ESI from the defendants. It was
12 our understanding, and I think it's a reasonable
13 understanding, that those 15 interrogatories should [be used
14 to retrieve that information that they're now seeking for us
15 to simply voluntarily provide at the beginning.

16 Secondly, the search protocol that plaintiffs
17 suggested had three rounds of search reports going back and
18 forth in between plaintiffs and defendants prior to the
19 defendants even producing anything to the plaintiffs. So
20 effectively what the plaintiff's search protocol does is it
21 injects the plaintiffs into the defendant's responsibilities
22 in the document production process.

23 This is completely unwarranted and not required by
24 any rule in the Federal Civil Procedure. In fact, the rules
25 are pretty clear that the responding party is responsible to

1 do a reasonable search for documents and produce the documents
2 back to the requesting party.

3 All of the cases which we know that the plaintiff's
4 relying on are in the procedural posture of a motion to
5 compel. So a motion to compel had been brought after an
6 original production, that original production is deemed
7 inadequate for some reason by the plaintiffs.

8 THE COURT: Hold on just a second.

9 Chuck?

10 JUDGE GO: Yes.

11 THE COURT: We've kind of -- let me just brief you
12 really quickly.

13 JUDGE GO: All right.

14 THE COURT: There's no problem. There has been an
15 agreement, proposed agreement on how to deal with the two
16 cases. And I can say it although I'll let Mr. Wittels say it,
17 you can put it on the record.

18 MR. WITTELS: Okay, I'll give it a shot. This is?

19 THE COURT: The [inaudible].

20 MR. WITTELS: Okay. The agreement will be that
21 within a few weeks we will likely either amend our complaint
22 or enter a stipulation with the defense counsel about how the
23 New Jersey plaintiff will be entered in our case. But it's
24 likely that that case will be voluntarily dismissed and that
25 counsel for the Fox case will be joined in as counsel in this

1 case, the Delgado action. That's probably how it will
2 proceed.

3 THE COURT: And otherwise if it doesn't, it's likely
4 it would be consolidated with it, with the Delgado case. So
5 it doesn't appear that Fox is going to proceed separately.

6 JUDGE GO: All right.

7 THE COURT: But counsel both will be up to see you
8 all in a little while. You're welcome to sit in but we're
9 just talking about ESI.

10 JUDGE GO: [Inaudible].

11 THE COURT: I don't think so. Do you all think you
12 need to see Judge Go?

13 MR. WITTELS: At this point I don't believe so.

14 MR. McELROY: I don't believe so.

15 THE COURT: Okay.

16 JUDGE GO: Okay. Thank you.

17 THE COURT: Sure. Take care.

18 Let me just jump in a second.

19 MR. McELROY: Sure, absolutely.

20 THE COURT: Do you -- so you're saying that this is
21 premature.

22 MR. McELROY: Absolutely, yes.

23 THE COURT: Do you disagree that plaintiffs are
24 following the Southern District protocol?

25 MR. McELROY: I don't disagree that they have based

1 their protocol on the SDNY pilot project, which has been
2 terminated. However, our -- at the end of the day this was an
3 agreement to -- in the case management group to try and come
4 to agreement on how we were going to produce ESI, not
5 necessarily how we were going to search for it, and have
6 plaintiffs be a part of our search requests.

7 However, after the first round of them sending us
8 the protocol and us objecting to those provisions, and most of
9 the provisions we had no problem with. It's about probably 85
10 to 90 percent of this protocol we came to agreement on pretty
11 quickly.

12 THE COURT: Right.

13 MR. McELROY: It's simply really the disclosure of
14 the information they're seeking even though they requested
15 interrogatories to seek it, and the involvement of the
16 plaintiffs in the search process that we are objecting to. In
17 response to that, we had a conversation and it was my
18 understanding after our conversation that what they were
19 really seeking was to know what our methodologies were and
20 have an opportunity to request, to tweak to the methodology,
21 if you will, in order to ensure that, as Mr. McInturff just
22 said, that it's neither over broad or under broad.

23 Initially I can state for the record that I'm not
24 the kind of attorney who simply does document dumps, and my
25 client is not interested in footing the bill for a document

1 dump either. However, to talk about the idea of discussing
2 search terms before we even looked at the documents. You
3 know, we've had the conversations with our -- with the
4 custodians we believe are going to have that information.
5 We've started to look at what we think would be relevant
6 documents. We're starting to formulate what our methodology
7 will be.

8 The plaintiffs have -- you know, us as defendants'
9 attorneys, we have very little knowledge to go on, so we're
10 relying very heavily on our client, we're discussing with our
11 client, working with our client on the best ways to find
12 stuff, documents and ESI that would be responsive. The
13 plaintiffs have even less information than we as defense
14 counsel do. We honestly don't understand how they would even
15 add value to discussions before anything is even produced,
16 before they see anything of ESI.

17 So in response, what we offered was after our
18 production we would give them the methodology. I have no
19 problem with providing them with the methodology that we used.
20 And once we provide them with the methodology that we used, if
21 they have a good faith basis to believe that there are
22 inadequacies in the search, we suggested five additional
23 search terms with a 250 megabyte cap for specific search
24 terms.

25 That's in addition to what will have already been

1 produced. So we thought that was relatively reasonable. I
2 would personally be willing to negotiate on those terms but
3 plaintiffs simply came back to us with their original proposal
4 and completely redlined our counterproposal. And at that
5 point we decided that we should discuss it with you.

6 Again we've come to agreement on approximately 90
7 percent including what the format of the production will be,
8 the metadata fields, and everything else. We just think that
9 it's inappropriate to inject the plaintiffs from the very
10 beginning into our search and retrieval of documents that are
11 responsive to the plaintiff's document requests, which is
12 clear under the Federal Rules that it's the responding party's
13 duties. And it's also clear under the Sedona conference
14 papers that the plaintiffs have relied on that it is the
15 responding party that is best suited and best situated to
16 determine what is responsive to a request and how they should,
17 how the materials should be preserved and produced.

18 After that we are happy to discuss it with them if
19 they have a good faith basis to believe that searches were
20 inadequate. Unfortunately, given the push and the language
21 that the plaintiffs have placed into this initial ESI
22 protocol, it appears to me that the plaintiffs want to assume
23 the inadequacy of our document production and our response to
24 their request.

25 THE COURT: Okay. So let me just jump in and give

1 you my perspective on this. I think the Southern District
2 pilot project was interesting. I'm sure Judges Scheindlin and
3 Francis had a lot to do with that, and I respect their
4 knowledge of these issues. They do a lot of judge training,
5 so we've all been trained by them. So I don't think that
6 there's anything wrong with what you're proposing at all.

7 My experience has been, both in criminal and civil
8 cases, that there is going to inevitably be a fight over
9 search terms. I just -- I don't think I've had a single case
10 where people have not fought over the search terms. Because
11 even if you've done a terrific job in filtering through, you
12 know, what you think the proper search terms will be, the
13 other side usually says, well, what I'm looking for isn't here
14 and maybe if we just tweaked it a little bit we'd be able to
15 do it.

16 And I think the purpose of having a protocol like
17 this is to have everybody meet and confer beforehand and see
18 if you can come up -- cut out the stage of disagreeing with
19 what's already been produced and perhaps save you money in not
20 having you go through several searches.

21 So my philosophy would be that -- and my experience
22 has been that if you just get the tech people together at some
23 point and just have them talk through the issues of what the
24 search terms would be and why you think a particular search
25 term would be better and why you think it -- you know, why you

1 think you need one and why you think you don't, I find that
2 that really helps.

3 I personally -- on the issue of whether or not we
4 have to use the Southern District protocol or there's another
5 way to do it, it doesn't matter to me as long as you have an
6 efficient way of discussing what ought to be in the search
7 before you start going through the search. And that doesn't
8 mean that the plaintiffs can dictate to you now, but I think
9 when you're ready to go ahead and do a search, before you do
10 that search I think your experts ought to sit down with the
11 plaintiff's experts and just find out beforehand if there's
12 some kind of agreement or disagreement on that.

13 Does that work for all of you?

14 MR. WITTELS: It does, Your Honor. And if --

15 THE COURT: Do you have a problem with it?

16 MR. WITTELS: No. If I can defer to our ESI
17 consultant so that he can describe the nature of the
18 methodology we propose for the search terms. Because I
19 disagree with counsel that it necessarily the plaintiffs
20 simply positing search terms.

21 Chuck, if you could talk about this --

22 THE COURT: Okay, before you do that.

23 As a concept, does that work for you?

24 MR. McELROY: Well, as a concept, I think that is
25 relatively consistent with what we had proposed in our

1 counterproposal. The --

2 THE COURT: Except that you don't conduct the search
3 first before you meet and confer.

4 MR. McELROY: The thing that I'm concerned about is
5 that when does it stop, when does the meet and confer stop
6 before the search terms? If we can't come to agreement on the
7 search terms, which in my experience trying to agree on search
8 terms is rarely capable of being done, if we can't come to an
9 agreement on the search terms, then the discovery process
10 comes to a halt at the very beginning.

11 Because instead of us seeing what we view as
12 responsive to the plaintiff's requests and even if we were to,
13 you know, simply say preliminarily this is the type of
14 information that we've been getting back, I just don't see how
15 the plaintiffs with less knowledge of the subject matter, with
16 no knowledge of the companies' inner workings, with my
17 client's inner workings or Mr. Previn's client's inner
18 workings, can add any value at the beginning of the process.

19 And, you know, honestly the only time I've ever
20 received a request like this is in litigation with the
21 Government. I've never received a request like this for an ESI
22 protocol prior to discovery from a private plaintiff.

23 THE COURT: I've seen it in criminal cases.

24 MR. McELROY: Oh. However, it just -- in the cases
25 with the Government at the very least they will have had some

1 materials already produced to them --

2 THE COURT: Right.

3 MR. McELROY: -- so they will have some knowledge or
4 maybe have done some depositions or some investigational
5 hearings so they'll have some knowledge in which to really
6 sort of narrow the scope of what they're looking for.

7 THE COURT: So the question is -- just before I hear
8 from you, the -- so you don't disagree that it wouldn't be
9 harmful for both sides to meet and confer beforehand, but the
10 question is if you don't reach an agreement, do you conduct
11 the search before you come to the Court or do you go to the
12 Court first and then conduct the search? Is that essentially
13 the -- at issue?

14 MR. McELROY: Well, I think that is an issue. I
15 think that Judge Fachola [phonetic], the District of Columbia
16 where I am, has said it very gracefully, that, you know, this
17 is not really the place for lawyers and lay people, this is
18 the place for people who have knowledge of the information
19 systems. So where I worry about it is that if we're trying to
20 come to search terms beforehand that it's going to be
21 virtually impossible to come to agreement on the search terms
22 without knowing what materials are even potentially responsive
23 out there.

24 THE COURT: I agree with you and I agree with him.
25 And I've heard him speak about this. That's why I think that

1 the IT people have to speak to each other, and that if you're
2 going to ask me at some point to resolve a dispute I'm not
3 going to just listen to the lawyers, I'm going to hear from
4 your tech people.

5 MR. McELROY: Right. One concern I have about that
6 is that plaintiff's IT person and my IT person, my IT person
7 I'm going to be using at the outset [inaudible] an IT person
8 [inaudible] have more information about the way the systems
9 are kept. But the IT people at the company aren't necessarily
10 going to have information about who's going to have relevant
11 information or, you know, the same way that if we were to go
12 about discussing -- which is what we're doing right now,
13 speaking with the relevant custodians, finding information,
14 seeing what other worlds may exist for this information, that
15 to me seems the most efficient way of doing this. And then
16 having the discussion about whether or not there are even any
17 deficiencies or things they thought they might see that are
18 appearing.

19 And to be honest, Your Honor, this isn't going to be
20 a case with millions upon millions of documents. I mean this
21 is a relatively small business area for my client. I believe
22 I'm not going out on a limb by saying I think it's a
23 relatively small business line for Mr. Previn's client as
24 well.

25 THE COURT: So how many documents do you think we're

1 talking about?

2 MR. McELROY: I think we're probably going to talk
3 about a grand total of in the range of maybe 100,000 pages of
4 documents. We're not going to talk about millions of pages of
5 potential documents. I mean I'm having a lot of this
6 information pulled, and I don't have the numbers yet because
7 I've wanted to wait until we came to the ESI protocol.

8 MR. WITTELS: Before Mr. Kellner begins, I think
9 we'd like to make it clear that any concern that counsel has
10 about plaintiffs not being educated about the systems before
11 we engage in this interactive process, that's the purpose of
12 what we included in our protocol of whereby defendants would
13 provide us with their custodian. So we haven't -- I do think
14 it's a little bit unfair to say they're not going to know
15 anything because we're not going to get -- and our response
16 is, well, of course we're not going to know anything if you
17 don't give us anything.

18 And so we would expect that to be entered in as part
19 of the order. And Mr. Kellner can talk about the methodology
20 that was laid out to make sure that the search is both
21 efficient and appropriate.

22 MR. KELLNER: Your Honor, if I may?

23 THE COURT: Sure.

24 MR. KELLNER: I'm Charles Kellner, I work with D4.

25 THE COURT: Pull that microphone a little closer to

1 you, the little one.

2 MR. KELLNER: My experience is in working with
3 counsel and assisting counsel in drafting and executing E
4 discovery protocols. And also in a few cases assisting the
5 court in moderating disputes about E discovery protocols.

6 In the proposal that we initially presented to
7 plaintiffs, you know, it wasn't, you know, it wasn't the
8 boilerplate from the Southern District's pilot project but
9 sort of a morph between that and the 7th Circuit pilot project
10 and some other E discovery protocols as well as orders that
11 we've seen around the country.

12 The components are basically to disclose the sources
13 of electronic information. So that would be custodians from
14 the various business units that might have potentially
15 relative information. You know, in this case we would expect
16 to see business people, accounting people, marketing people,
17 and not inconsequentially, data base people that have lists of
18 mortgage accounts and insurance accounts from -- to which
19 these mailings were done, marketing materials and so on and so
20 forth.

21 So that for us would set the parameters of the scope
22 of discovery and allow us to in fact narrow or agree on a list
23 of custodians. And we think that that gives us some
24 visibility but in ways -- you know, because it's assigned
25 protocol, makes it fair for them to understand what their

1 scope is going forward.

2 Search terms, you know, as we all know from Judge
3 Fachola's instruction as well as others, they're not exact.
4 And it is in fact guesswork, and there is the opportunity to
5 both include over breadth as well as miss important responsive
6 data. The protocol that we recommended had essentially three
7 rounds of looking at search reports.

8 And we would anticipate that they would be doing
9 that on ESI that they had collected so that they're actually
10 being able to look at search reports and evaluate their review
11 obligation, which is the most expensive part of the discovery
12 process. So it would give them some visibility on scope, and
13 it would give us some visibility on at least potentially the
14 volume of information that we're likely to receive.

15 And the iterations of looking at the search results
16 would allow us -- would allow them to present to us
17 information about over breadth. So here is a search term that
18 has so many search hits that aren't included in any other
19 documents, you need search hits; it would obviously be a
20 target to reduce over breadth. And we would look at search
21 results, for example, that we thought would deliver some
22 recall but were low in numbers. And so obviously we're
23 guessing wrong, but since they own the corpus they could help
24 us adjust that.

25 And so to answer counsel's concern about it going on

1 forever without conclusion, it's been our position that if we
2 go a few rounds of this, and I've seen it go as many as seven
3 rounds but three rounds in a case like this of looking at the
4 reports and modifying it and go back to search, that it would
5 be reasonable to do that.

6 One of our concerns is to put all of this in a
7 protocol that's actually written and, if necessary, can be
8 signed into an order, both the sources of ESI and the
9 custodians as well as the search protocol, so that we're not
10 here six months from now talking about, well, we agreed in
11 that order to talk about it afterwards but then never actually
12 set the stage to agree on it. So we actually want it in the
13 protocol rather than laying out a procedure to discuss it
14 later and decide on it later.

15 THE COURT: Now, the way I feel about it is we're
16 all dealing with crystal balls here. Because nobody really
17 knows for sure what you're going to find. And my experience
18 has been that oddly enough we all have a common interest in
19 trying to make this as precise as possible and as inexpensive
20 as possible so you don't spend, you know, all your vacations
21 looking, reviewing documents.

22 And the way it's going to end up, because I'm not
23 going to be any better at this than any other judge, is that
24 I'm going to be asking you for the same kinds of things that
25 we're just talking about right here if there is a dispute. So

1 it's probably going to make sense to have a protocol designed
2 beforehand that will get all the information that the Court is
3 going to need to be able to resolve any disputes you have and
4 to rely on you hopefully to be as reasonable as possible to
5 make the compromises you have to make, you know, to avoid the
6 expense and the over breadth.

7 It just seems like a question of timing, your
8 differences. And all I can say is that I'm going to want to
9 have the information that Mr. Kellner has discussed before you
10 come to me anyway. And the question is what's cheaper and
11 better. And I'm going to want to know that whoever your IT
12 people are have talked to each other and have tried to do
13 this, you know, modify the search terms.

14 You know, I've had cases with large corporations
15 where -- with the Government involved and without the
16 Government involved where we've gone through, you know,
17 individual search terms names and people have asked me to
18 decide whether a particular search term makes sense or not.
19 And in the end I'm going to be going to the IT people and
20 asking them, well, what's -- how many hits you going to get
21 with this one, what do you with the other one.

22 And so to the extent you've done all that homework
23 before you've cut out, you cut out the need to come to the
24 Court and ultimately the Court deals with these things with a
25 blunter instrument than you will.

1 MR. McELROY: Well, and Your Honor, I do believe
2 that our counterproposal envisions all of that. You know,
3 plaintiffs said in their letter something to the effect of
4 they're worried about what our methodology will be or -- it's
5 our responsibility to be able to defend our methodology. And
6 we certainly offered to give the plaintiffs our methodology
7 and then to discuss that and negotiate that well before we
8 would ever come to you with the issue.

9 THE COURT: Can I just stop you? But isn't the
10 difference really whether you conduct a search before you go
11 through these protocols with plaintiffs?

12 MR. McELROY: Yes. I --

13 THE COURT: That's the difference, right?

14 MR. McELROY: Correct. And I do not believe that
15 it's appropriate nor required to allow the plaintiffs to be a
16 part of our original search. And that I think is where the
17 ultimate --

18 THE COURT: Why does it make a difference?

19 MR. McELROY: -- objection comes. Because in my
20 experience these things cannot be negotiated and settled very
21 well ahead of time.

22 THE COURT: But what if you had an agreed -- well,
23 so the modification to the agreement to get what both sides
24 really want is you'd have to meet and confer before you have
25 the search. But if you can't agree, you conduct the search

1 and then counsel would meet and confer with you one more time
2 before coming to the Court and the Court would make the
3 decision. Is that essentially --

4 MR. McELROY: I think that is a reasonable
5 compromise, yes, Your Honor.

6 THE COURT: Would that work for plaintiff? Is there
7 any reason for them -- are you harmed, are you prejudiced in
8 any way by having input before they conduct the search trying
9 to agree, you don't agree, they conduct the search, you look
10 at it and say, ah, my worst fears were realized or I was wrong
11 and then come to the Court?

12 MR. KELLNER: It is without a doubt much more
13 effective to conduct searches and develop search criteria
14 based upon data that they've already got available to search.
15 We're actually looking at results while we're testing and
16 proposing search terms. So in that regard I would have to
17 agree.

18 THE COURT: Okay.

19 MR. KELLNER: Not knowing in advance on what even
20 the scope is, in other words whose email, whose files, what
21 locations of information. And then even beyond the search
22 terms, because you can't apply search terms to structured data
23 information, lists of customers and account holders and so on
24 and so forth.

25 We need to know the parameter of that so that we at

1 least know the pool of custodians and ESI that we're talking
2 about. We need to know that, I think that the data that we're
3 looking for in this case is going to be in the case.

4 MR. McELROY: To be fair, Your Honor, we have agreed
5 to provide all that information with the, any production that
6 we give to them.

7 THE COURT: Right.

8 MR. McELROY: We've agreed to give the custodians,
9 the file names. In addition, we provided them previously with
10 our Rule 26 disclosures, which are relatively detailed in who
11 the people are that have the most knowledge about marketing
12 materials. Those are the people that I'm going to now to get
13 the information that I need to do further searches. So to the
14 extent that we would have any disclosure of whose -- what
15 custodians or ESI we're going to be searching, we're going to
16 be starting with those people. We don't know beyond that this
17 morning.

18 Because those are the people who are primarily
19 focused on this particular program, so we start with them and
20 then it can expand from there. And of course our protocol
21 envisions that idea. Nothing of course would prevent the
22 plaintiffs from coming back and asking us to, you know,
23 reasonably to expand the custodians that we previously
24 searched based on the information provided. Or propounding
25 additional document requests of course, based upon information

1 they found in the initial document requests of our initial
2 interrogatory response.

3 THE COURT: Okay. So --

4 MR. KELLNER: I mean, Your Honor, if I may. From a
5 production perspective, that puts a lot of burden on
6 plaintiffs to wait to see and go through an entire production
7 to see if it's got the people in it that they're looking for
8 only to then have to ask for another production including a
9 subsequent review. So we really would like to see the sources
10 of ESI, to see the custodians, and to see the shared
11 resources, the noncustodian resources. And to know what that
12 list is about and to understand even the date range scope.

13 THE COURT: Before the search is conducted.

14 MR. KELLNER: Right.

15 THE COURT: Okay.

16 MR. KELLNER: We would expect at this time they've,
17 you know, evaluated their systems, they've preserved ESI and
18 so on and so forth, that they know that much about it to be
19 able to tell us about it.

20 THE COURT: Okay. And as I understood, counsel,
21 what you were saying is you just want them to use up one of
22 the interrogatories to do that.

23 MR. McELROY: Yeah, we specifically agreed to 15
24 interrogatories regarding ESI for the plaintiff. If they're
25 going to request this information of ESI protocol, I suggest

1 that those 15 interrogatories should --

2 THE COURT: Well --

3 MR. McELROY: -- [inaudible] case management. I
4 don't see what other information they would be seeking about
5 ESI in those interrogatories they specifically request.

6 THE COURT: I don't want to spend a lot of time
7 arguing over the number of interrogatories. Because I think
8 ultimately they're entitled to have this information. And if
9 they reasonably propound interrogatories and they've used up
10 their 15 and they have to ask one more to find out the
11 custodians and the source, I'm probably going to give it to
12 them.

13 MR. McELROY: That's understood, Your Honor. I just
14 -- I think that we agreed to what I thought was the process
15 was going to be and now --

16 THE COURT: Yeah.

17 MR. McELROY: -- it seems that, you know --

18 THE COURT: Expanding.

19 MR. McELROY: Yeah, expanding. [inaudible].

20 THE COURT: Okay. But it sounds like one or two
21 interrogatories is all you're going to need, right?

22 MR. WITTELS: Well, Your Honor, first of all, we
23 believe that the disclosure of this information is part of the
24 Rule 26 meet and confer process. So we would have never put
25 interrogatories into the case management order that would

1 intentionally postpone our ability to gain relevant
2 information.

3 I mean the interrogatories were put in the case
4 management order sort of as a cleanup of after the Rule 26
5 meet and confer process goes through. I mean it just
6 occasions more delay to have to propound interrogatories and
7 have objections and responses. I mean the information that
8 we're requesting is consistent with best practices. We've put
9 in --

10 THE COURT: Okay. So I don't think we need to
11 discuss it anymore. I think you do need to produce that
12 custodian information and the sources beforehand. That's
13 something that we've always done in other cases I've dealt
14 with. And I just think it makes the process more streamlined
15 and efficient in the end. And you can supplement it if you
16 wish afterwards, you know, if something -- if there are other
17 sources.

18 MR. KELLNER: Sure.

19 THE COURT: And this goes both ways, of course. I
20 don't know if there's anything -- you don't really have any
21 ESI, do you.

22 MR. WITTELS: Minimal. It's a consumer class
23 action.

24 THE COURT: Right.

25 MR. McELROY: To be fair, we have produced our Rule

1 26 disclosures. I haven't heard anything from plaintiffs
2 where they think there's any deficiency in them, but I will go
3 back and look at that to see if there's [inaudible].

4 THE COURT: Okay.

5 MR. WITTELS: Which would include, you know, data
6 sources, data bases, as we put forth in our Exhibit B to our
7 proposed order. That's the information that we're requesting
8 as part of the meet and confer process. And it does go well
9 beyond the initial disclosures. It relates to much more of
10 the technical nature of what's going to be searched and the
11 location of various data.

12 THE COURT: Okay. I think that -- yeah, Exhibit B,
13 yeah. Well, that has to be provided at sometime anyway, and I
14 think it makes sense doing it at the outset. That's just been
15 my experience.

16 Okay. So do we have an agreement on this protocol
17 then? You know, you'll meet and confer beforehand. Hopefully
18 you'll be able to work most things out. If you can't work
19 them out, then defendants can go ahead and conduct their
20 search. It's not going to go on forever if you don't agree.
21 And then you'll review what happens afterwards. Meet and
22 confer again to see if you can deal with any problems and then
23 come to me.

24 MR. WITTELS: Well, we would like to use the process
25 of the stage searching where the defendants go through and

1 check their search terms and inform us of the range of what is
2 uncovered through their search. We think that that's going to
3 be a much more efficient process than defendants conducting a
4 search and then telling us what they found.

5 THE COURT: No, but beforehand they will tell you
6 what the search, their methodology will be, what their sources
7 of data, what the data range will be, the search terms, et
8 cetera.

9 MR. WITTELS: They would also need to provide the
10 hit reports of the search terms. So they pick 15 search terms
11 that hit nothing, without a hit report we can't tell until
12 after the production comes whether or not those search terms
13 are either over broad or under inclusive. Which is why we put
14 in this process in our proposed protocol that we would go back
15 and forth three times. And as Mr. Kellner said, that's
16 relatively circumspect, that we would go back and forth --

17 THE COURT: Yeah, I'm adopting your initial -- the
18 only change that I'm making to it is that if you don't all
19 agree on the ultimate methodology, that the defendants are not
20 barred from going ahead and conducting the search. Because
21 I'm going to want to see actually who was right and have a
22 better idea of what the search turns up. And then you can all
23 meet and confer and talk about it if you still have
24 disagreements, and then come to me afterwards.

25 MR. McELROY: Your Honor, if I may. Their system

1 system does have what I believe to be the likely side effect
2 of adding a lot of additional cost up front for us by
3 including the plaintiffs effectively in our decision making up
4 front. So we'll say we ran these searches, we gave you these
5 hit reports, and they say no, go back and run these search
6 terms. We go back and run those search terms and say we got
7 back. They'll say, no, that's still not good enough, go back
8 and run another one. Once we go through that three times
9 we'll have spent a pretty decent amount of money on what we
10 normally would probably have spent on our first production
11 before we even get to the point of production.

12 I think that if the plaintiffs are going to be
13 involved so heavily up front in the decision making of what
14 documents we are going to produce and what is relevant to our
15 production, that some of that cost should be shared.

16 MR. KELLNER: And, Your Honor, the way that we
17 typically have seen it done -- and it might be useful to draw
18 your E discovery expert, your vendor into the process -- is
19 that once you've decided on the sources of electronic
20 information to collect it, and then when it's collected it's
21 indexed and available for search.

22 So, you know, one or a number of search terms could
23 be applied against the collection all at once and to generate
24 a search report. And then the incremental cost of revising
25 the search or adding some other search terms, you know, it

1 really isn't any additional cost other than some tech time to
2 revise the syntax and run another report to see it.

3 THE COURT: From the search, what you're saying the
4 search really isn't where the cost comes, it's the data
5 collection.

6 MR. KELLNER: Well, the data collection, they're --
7 we would expect that they would target the data collection to
8 the sources of ESI, the people that they think have relevant
9 information about these transactions. And that either as part
10 of their preservation of the collection they would collect it,
11 and that would be the corpus against which the search terms
12 were applied.

13 THE COURT: But do you disagree as to where the cost
14 is? In other words, Mr. Kellner is saying the cost doesn't
15 come from the search as much as it comes the collection of the
16 data.

17 MR. McELROY: Well, I suppose if the only thing
18 we're going to be looking at is hit reports, and honestly I
19 don't understand how that assists in getting to where we want
20 to go, but if the only thing we're going to do is be looking
21 at hit reports, I agree that the incremental cost is probably
22 not going to be that great. However, in order to determine
23 whether or not responsive documents are actually being
24 provided, something more than just hit reports needs to be
25 done. That includes likely enlisting either some sort of

1 technology assisted review or enlisting, you know, a small
2 army of folks to view this stuff and assist to see whether or
3 not there are actual responsive documents being produced.

4 So let's say hit reports, we come back with hit
5 reports that they agree to. Okay. So now we have the hit
6 reports and we go through them. Are these responsive
7 documents, is that -- and they get it and they look at it and
8 they say, ah, this isn't what I wanted. So we go back and
9 refine the search again. Personally that's my experience with
10 this type of --

11 THE COURT: But isn't that their expense?

12 MR. KELLNER: I think that that's reading more into
13 what we've got in the protocol than that. If you've got the
14 corpus of data and you've got the ability to search it and to
15 provide hit reports, you've got the opportunity to look at the
16 content, the results of those searches to see whether
17 something is responsive or over broad. You haven't made any
18 productions to us yet at that point.

19 MR. McELROY: No, but these -- in reviewing a
20 determination of the responses, this is actually where the
21 cost is involved, which I'm sure you'll agree with me on. The
22 actual processing for production is a relatively minor cost
23 compared to the actual determination of responsiveness.

24 MR. KELLNER: Right. But anything that's responsive
25 you're going to produce anyway. Anything that's a search hit

1 that's not responsive, you're going to review a few of those
2 and say it's too broad, you know, we need to narrow it. That
3 way it's recalling all sorts of things that don't have
4 anything to do with the case.

5 THE COURT: I mean what I would be likely to do is
6 what happens in most cases, someone says, well, why don't we
7 look at a small sample just to see whether this -- these
8 search terms were accurate or not. And my guess is that's
9 what you'll do. And it sounds as though the expense would be
10 more on the plaintiff's side than on your side.

11 MR. McELROY: Perhaps. I'm not sure about that.

12 THE COURT: Yeah.

13 MR. McELROY: I mean at the end of the day we have
14 to do both a privilege review and actual review [inaudible]
15 documents. I don't think the plaintiffs will probably be very
16 happy if we review the 5 or 10 percent of the documents and
17 [inaudible]. You know, at the end of the day my concern is
18 where does this end. Because being able to have this
19 iterative process sounds nice, but it assumes the ability to
20 agree and compromise, which, based upon our attempts to
21 compromise just on this [inaudible], it appears will not be
22 possible.

23 Because we didn't even get any compromise back on
24 there yet [inaudible] insisting on their original language
25 over and over again even after we attempted to compromise.

1 Originally we didn't want to agree to any of it. We said
2 fine, compromise, we'll agree to that. If that's what it
3 takes to get this moving forward we'll compromise [inaudible]
4 up front with an opportunity to [inaudible] and come back to
5 us for searches [inaudible] for that. And they rejected that
6 completely and came back to us with their original language.

7 So it all comes back to my concern --

8 THE COURT: We're back to trust.

9 MR. McELROY: No.

10 THE COURT: Yeah, it comes back to trust ultimately,
11 which is hard to establish in litigation. But is it really
12 just a question of how many rounds they're entitled to go back
13 to? I mean they're requesting three rounds. If they just had
14 one, would you go back one time and then come to the Court?
15 Does that work for you? Because otherwise I'm just going to
16 come up with an arbitrary number.

17 MR. McELROY: One round was effectively our
18 counterproposal. I would be happy to agree with that. And
19 discuss with them ahead of time potential searches as well.
20 But the idea of going back and forth three times with a need
21 to have a certain percentage responsiveness or [inaudible] I
22 worry that that sets us up for never really being able to get
23 in a position where we can say [inaudible].

24 Whereas under the normal rules we provide our
25 production and we say this, these are all the documents that

1 we found. Reasonable methodology [inaudible]. And if there's
2 something that you think is inadequate you have to show us
3 some reason, show the Court some reason that that production
4 is inadequate. And I think that's a fairly uncontroversial
5 statement.

6 MR. WITTELS: Well, we disagree with the counsel's
7 characterization of their proposal. They offered us five
8 additional search terms in one shot.

9 THE COURT: No, I'm not going off their proposal. I
10 think what we've established so far is that there's going to
11 be this exchange of data sources, scope of time, all that plus
12 this process that we talked about. And that the process would
13 be that you would all meet and confer before the search is
14 conducted. But if you don't agree on the search terms,
15 methodology, et cetera, then defendant is permitted to go
16 ahead with the search.

17 Once that search is conducted, then the results will
18 come back to you, and now we're just talking about at the end
19 how -- whether there'll be three rounds, two rounds or one
20 round of trying to meet and confer and you have to try to work
21 things out beforehand. And I think one round perhaps might be
22 before you come to see me, might be the compromise that's
23 reasonable, one or two, that's it.

24 MR. WITTELS: We would think at least two, but the
25 reason we asked for three is because the incremental costs of

1 additional searches are small. So why not front load the --

2 THE COURT: Right.

3 MR. WITTELS: I mean it's essentially discussion and
4 we're saying let's build in more time into the discussion up
5 front because the costs are small so that we can avoid
6 potential --

7 THE COURT: No, I understand what you're saying.
8 Apparently there's a dispute about where the cost is. And if
9 I -- it sounds to me as though the costs would be small
10 incremental costs. And if you come back to me in, let's say,
11 after two times and counsel can show me that the cost is
12 great, then I'll make a decision. But if it's not great, then
13 I'll probably send you back one more time.

14 MR. McELROY: And, Your Honor, if plaintiffs would
15 be willing to agree to some sort of provision where if we have
16 this iterative process of three times going back and forth,
17 then they're going to be -- you know, we complied with our
18 obligation and we have some agreement like that, then maybe
19 that's something we can look into.

20 THE COURT: How about presumptively complied?

21 MR. McELROY: Sure. The --

22 THE COURT: Presumptively and then it's their burden
23 to overcome it. I think that's probably the way it works
24 best.

25 MR. McELROY: Because the thought --

1 THE COURT: That's a very good suggestion. Let's do
2 it that way.

3 MR. McELROY: Yes. The thought of them having to
4 file a motion to compel on top of it.

5 THE COURT: Right. You don't want to have to do
6 that. So why don't we take you try to work it out three
7 times. Then it's presumptive compliance. And then it's your
8 burden to show there's more that has to be done. Okay? Are
9 we good? I have another case that I --

10 MR. PREVIN: Your Honor, very quickly, is it --
11 (Court and Clerk confer.)

12 THE COURT: Okay. Quickly.

13 MR. PREVIN: Yeah, very quickly. If we do actually
14 reach agreement on the terms --

15 THE COURT: You write it up.

16 MR. PREVIN: Pardon me?

17 THE COURT: Do you want to write it up?

18 MR. PREVIN: Well, no. I meant at that point and
19 then we make our production, is it fair to say that the
20 plaintiffs cannot after the fact object and say, no, you've
21 got -- we don't like the sample, we don't like what you
22 produced under those searches, we want you to go back and use
23 others searches. I mean if we agree up front in this process
24 and we can reach a resolution, that's the end of it, right?

25 THE COURT: If you agree as to what the search terms

1 would be, yeah, you've agreed to them, right.

2 MR. WITTELS: We -- your Honor, if I -- we did add a
3 sentence saying that if they should find any responsive
4 information outside of what was recalled by the search terms,
5 they're obligated to produce it.

6 THE COURT: Right.

7 MR. WITTELS: We can't be --

8 THE COURT: Right.

9 MR. WITTELS: -- held to actually guess at every
10 right term --

11 THE COURT: No, exactly. And this is all
12 presumptive, right? So there's a presumption. I mean nothing
13 is ever barred in the courts.

14 MR. PREVIN: No, I understand. Your Honor, just
15 with respect to that one sentence, we do really ask for one
16 modification to that language. It says that, their proposal
17 said that we uncover any responsive document at anytime, we
18 have to produce it within seven days. Instead of a seven
19 day --

20 THE COURT: What -- substitute a number of days.

21 MR. PREVIN: A reasonable period of time. I mean
22 this is going to -- there's going to be rolling productions.
23 You know, we're going to make --

24 THE COURT: Thirty days?

25 MR. PREVIN: We can -- well, it can't be that every

1 time we find a document at any point in the process we have to
2 produce it within seven days. There are going to be rolling
3 productions, we're going to be --

4 THE COURT: Within a reasonable time is what you
5 want.

6 MR. PREVIN: Yeah, I mean instead of a seven day --

7 THE COURT: Do you have any objection to that?

8 MR. WITTELS: (No audible response.)

9 THE COURT: Okay.

10 MR. WITTELS: Your Honor, we have -- the differences
11 in the proposed protocol, we have a redline here. You can see
12 what we had proposed to insert. It includes more than just the
13 Exhibit B that we submitted. It's a couple of additional
14 paragraphs. Perhaps we should submit the redline for your
15 review so you can --

16 THE COURT: I want to have what we've worked out
17 here today to be the agreement. If you think it's not
18 complete enough, then I think -- I've given you the template
19 and I'd like counsel just to agree on it.

20 MR. McELROY: [Inaudible] with this as the basis --

21 THE COURT: Yeah, just work on it.

22 MR. McELROY: -- [inaudible].

23 THE COURT: I think you know what I'm looking for,
24 and I'm trying to make it work for both sides.

25 MR. WITTELS: Thank you, Your Honor.

1 MR. PREVIN: Thank you.

2 THE COURT: All right. Do we need another
3 conference?

4 MR. WITTELS: Yes.

5 THE COURT: Okay. So two months? Okay, let me see
6 what we have in two months. April 14th?

7 THE CLERK: [Inaudible].

8 THE COURT: What time? Okay, we're looking at April
9 14th. April 14th at 12:00?

10 MR. McELROY: That works for Cross Country, Your
11 Honor. Would that be a telephone conference?

12 MALE VOICE: Telephone conference or?

13 THE COURT: It's up to you how you want to do it.

14 MR. WITTELS: Judge, could we do the 17th, a Friday?
15 Is that possible?

16 THE COURT: No, and I'm not sure why but we have a
17 do not schedule anything. No, Friday can't be done. The 14th
18 and the --

19 MR. WITTELS: How about the 16th?

20 THE COURT: No. The 14th is the last day that we
21 [inaudible].

22 MR. WITTELS: The 14th is the last day, sorry, for?

23 THE COURT: That I'm free that week.

24 MR. WITTELS: Oh, that week.

25 THE COURT: It's the only day that --

1 MR. WITTELS: 20th?

2 THE COURT: -- [inaudible] or not. I'm sorry?

3 MR. WITTELS: The 21st?

4 THE CLERK: Not the weekend, the 21st, and I have
5 arraignments the following week. So really the only time in
6 April -- yeah, April is a terrible month.

7 MR. WITTELS: Then what was the only --

8 (Court confers with Clerk.)

9 THE COURT: Okay. If you can --

10 MR. WITTELS: How about the 5th?

11 THE COURT: No, there's a do not schedule on that.
12 I don't know why. We have a do not schedule on that. I don't
13 know if we're holding it for a trial or -- I have an idea what
14 it's for. The 14th you cannot do? Okay, I'm going to ask you
15 -- I'm going to have to deal with this other case so --

16 MR. WITTELS: We'll take it.

17 THE COURT: Okay.

18 MR. WITTELS: 14th, whatever time.

19 THE COURT: At 12 o'clock.

20 MR. WITTELS: 12 p.m.?

21 THE COURT: Uh-huh. So it's up to you whether you
22 want to do in person or by phone. If it's like today, it's
23 probably an expense to do it in person.

24 MR. WITTELS: Thank you, Judge.

25 MR. McELROY: Thank you, Your Honor.

1 MR. WITTELS: It might be better to revisit in
2 person.

3 THE COURT: Okay. Thank you.
4 (Proceedings ended at 3:15 p.m.)

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2 I certify that the foregoing is a court transcript from
3 an electronic sound recording of the proceedings in the above-
4 entitled matter.

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7 Sally Reidy

8 Dated: February 23, 2015
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